

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

**BRANCH BANKING & TRUST COMPANY,** )  
**OF VIRGINIA, a Virginia banking company,** )  
**Plaintiff,** )

**v.** )

**TODD FOWLER, et al.,** )  
**Defendants.** )

**Case No. 7:04CV00624**

**By: Hon. Michael F. Urbanski**  
**United States Magistrate Judge**

**REPORT AND RECOMMENDATION**

This matter is before the court for report and recommendation on plaintiff's Branch Banking & Trust Company of Virginia's ("BB&T's"), motion for default judgment under Federal Rule of Civil Procedure 55(b)(2) and on the motion of defendants Kevin T. Lilly, Robert Earl Barnett, and Michael A. Stone ("the guarantors"), by counsel, for additional time to file an answer or responsive pleading. The remaining guarantor, Todd A. Fowler, has neither answered nor moved for an extension of time.

This action was commenced on October 26, 2004 against four guarantors of a BB&T note with Quorum Radio Partners ("Quorum Radio"). Each of the four defendant guarantors signed waivers of service requiring them to answer the complaint within sixty days of service. No answers or responsive pleadings were filed. BB&T moved for a default judgment on January 14, 2005, and noticed a hearing for February 8, 2005. At that time, the parties requested that the undersigned take the motion for default under advisement to give them a month to work out payment of the note. On March 1, 2005, BB&T renewed its motion for default judgment, and as defendants can provide no reason other than inattention to excuse their failure to answer, the undersigned recommends that the

guarantors' motion for an extension of time be denied and BB&T's motion for default judgment be granted.

#### **I. The Guarantors' Motion for Extension of Time**

Three of the guarantors, Lilly, Barnett and Stone, appeared at the March 1, 2005 hearing by counsel and filed a motion to extend the time to answer. In their motion and at the hearing, defendants provided no excuse for their failure to respond to the complaint other than "inattention." Counsel noted that these three guarantors assumed the other defendant, Todd A. Fowler, was taking care of the situation and that other issues had arisen causing Fowler's separation from Quorum Radio. The guarantors also argued that the prejudice to them "far outweighs" any prejudice to BB&T in permitting them additional time to plead.

Counsel for the three guarantors stated that he has been in contact with corporate counsel and that it is expected that Quorum Radio will file bankruptcy. In that case, the guarantors would seek the protection of the bankruptcy court from enforcement of any judgment against the guarantors.

For its part, BB&T argued that it has made every effort to work with these defendants to avoid a default judgment, including continuing the hearing for a month to allow defendants to work out this obligation. Plaintiff also noted that guarantors point neither to any legal authority justifying their "inattentiveness" in the course of this action nor how the prejudice to them by the entry of this default judgment outweighs that to BB&T of not doing so. Counsel for BB&T argued that the bank has bent over backwards to accommodate the guarantors and give them more time to no avail.

As the guarantors are in default, have provided no justifiable excuse for their inattention to the process served upon them and were given an opportunity to avoid a default judgment when the matter

was taken under advisement on February 8, 2005, the guarantor's motion for additional time to plead will be denied.

## **II. Plaintiff's Motion for Default Judgment**

### **1. Factual Background**

On May 29, 2003, Quorum Radio Partners ("Quorum Radio") executed a promissory note payable to BB& T. As of October 19, 2004, Quorum Radio Partners is indebted to BB&T in the principal balance of \$249,337.88, plus accrued and unpaid interest of \$7,234.26 and late fees of \$177.31. As of the date of this report and recommendation, interest continues to accrue on the principal balance at an annual rate equal to BB&T's prime rate plus 5% per annum until paid.

By guaranty agreements dated May 29, 2003, and June 25, 2004, defendants jointly and severally guaranteed Quorum Radio's obligation under the note. BB&T has made demand upon each defendant for payment of his obligations under the applicable guaranty, and initially, no payment was made.<sup>1</sup> As such, BB&T has asserted that it is entitled to judgment against defendants under the guaranties for all of the outstanding obligations due BB&T, including \$249,337.88 in principal, accrued interest as of March 1, 2005 of \$6,638.11, late fees of \$177.31, plus reasonable attorney's fees and costs. As of March 1, 2005, the total of these obligations, not counting reasonable attorney's fees and costs, is \$256,153.30.

Regarding the reasonable costs of attorney's fees, counsel for BB&T submitted an affidavit stating that through March 1, 2005, his firm had incurred billed and unbilled fees and expenses totaling

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<sup>1</sup> Since the court initially took plaintiff's motion for default judgment under advisement, defendant Barnett has made a payment of \$5,000 on the outstanding debt, and WKEY, Inc. of Covington, Virginia, has also made a payment of \$5,000. Although these payments provide some indicia of good faith, counsel for defendants did not provide any valid rationale for not filing an answer to BB&T's complaint.

\$5,318.58 in connection with the collection of the indebtedness guaranteed by defendants. John C. Stone, a Regional Special Assets Officer for BB&T, testified that collection efforts were likely to be protracted and difficult given that Quorum Radio is expected to seek bankruptcy protection, all four guarantors are located out-of-state in four different jurisdictions,<sup>2</sup> and that the guaranty agreements were not secured. As a result, Stone estimated that a reasonable attorney's fee would approximate twenty (20) percent of the total indebtedness, an amount, as of March 1, 2005, totaling \$51,230.66.

## 2. **Substantive Legal Analysis**

As service was validly effected on defendants under Federal Rule of Civil Procedure 4, and defendants have chosen not to plead or otherwise defend themselves in this action, all of the averments in the complaint are deemed admitted. Fed. R. Civ. P. 8(d); Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2001) (stating that "the defendant, by his default, admits the plaintiff's well-pleaded allegations of fact"). Although defendant Fowler appeared at the February 8 hearing regarding plaintiff's motion for default judgment, and the remaining three guarantors appeared by counsel on March 1, none of the defendants have yet filed an answer. BB&T has presented sufficient evidence to support its claim for damages, costs, and fees by way of uncontradicted affidavits and testimony at an evidentiary hearing at which three of the defendants were represented by counsel.

Here, defendants' legal liability stems from their guaranty of the note between Quorum and BB&T. The court has subject matter jurisdiction over the complaint pursuant to 28 U.S.C. § 1332 because the amount in controversy, exclusive of interest and costs, exceeds \$75,000. The court has personal jurisdiction over defendants pursuant to the Virginia long-arm statute. Va. Code. Ann.

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<sup>2</sup> The four defendants named in this case currently live in Texas, Arkansas, Massachusetts, and Indiana.

§ 8.01-328.1(a)(1). Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim took place in the Western District of Virginia.

3. **Amount of Default Judgment**

Plaintiff's have moved for a total of \$256,153.30 in principal, interest, late fees and "reasonable attorney's fees" in an amount of twenty (20) percent of the outstanding debt, an amount equal to \$51,230.66, for a total of \$307,383.96. With the exception of the attorney's fees, the amount of the principal, interest and late fees can be computed with certainty from the pleadings and accompanying notes. As regards the attorney's fees, BB&T's Stone testified that given the lack of security, the need to retain counsel in Texas, Arkansas, Massachusetts and Indiana to pursue collection, it would not be unusual to incur ten to fifteen thousand dollars (\$10,000 - \$15,000) in legal fees to pursue collection from each defendant. Based on this testimony, BB&T sought an award of attorneys' fee of 20%, amounting to \$51,230.66. Considering this uncontroverted testimony, including the personal financial statements of defendants introduced as Exhibit 2 at the hearing, the court adopts the low end of Stone's scale and finds a reasonable attorneys' fee to be \$40,000. It is the recommendation of the undersigned that plaintiff's motion for default judgment be granted and judgment be entered on behalf of plaintiff for \$296,153.30 (\$256,153.30 in principal, interest and late fees and \$40,000 in attorneys' fees), jointly and severally against the four named defendants.

4. **Conclusion**

The Clerk of the Court is directed immediately to transmit the record in this case to the assigned United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to

within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to all counsel of record.

Enter this 3<sup>rd</sup> day of March, 2005.

/s/ Michael F. Urbanski  
United States Magistrate Judge